THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT GULU

CIVIL APPEAL No. 0015 OF 2017

(Arising from Kitgum Grade One Magistrate's Court Civil Suit No. 039 of 2016)

NYERO MICHAEL …… APPELLANT

VERSUS

1. OTOO ALBINO }
2. OYOO VINCENT }
3. OCHAN MICHAEL } ….…… RESPONDENTS
4. OCHOLA MICHAEL }
5. ORACH BENSON }

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The appellant sued the respondents jointly and severally for recovery of approximately ten acres out of approximately sixty one acres of land situate at Okora North and South villages, Alaa Parish, Padibe East sub-county, Lamwo District, a declaration that he is the owner of the land in dispute, general and special damages for trespass to land, a permanent injunction, interest and costs. His claim was that he inherited the land in dispute from his late father, Okwir Erinayo. He presented a copy of the grant of letters of administration. During or around March, 2016 the defendants without any claim of right forcibly entered onto that land, without his consent or other lawful authority, and took possession of parts of it. His attempts to urge them off the land were unsuccessful, hence the suit.

In their joint written statement of defence, the respondents refuted the appellant's claim and contended instead that the land in dispute belonged to their four deceased grandfathers who acquired it as customary land and upon their demise were buried on that land. Their other

deceased family members too were buried on the same land. The first respondent was born and raised on the land in dispute from which he has since had children, including the rest of the respondents, on that very land. They have all along used the land for cultivation and grazing livestock and the dispute only sprouted in 2008 following the insurgency.

In his testimony as P.W.1, the appellant stated that the respondents are his clan brothers in the Loti Clan. It is during the year 2015 that the respondents began trespassing on about ten acres of his father's land. The land originally belonged to his grandfather Okwir Erinayo who acquired it in 1926. Upon his death, the land passed on to the appellant's father, the late Kwang Milton. Both his father and grandfather were buried on that land upon their demise. His father bequeathed the land to him by will dated 8th December, 1995. The respondents left their own land within the same area and trespassed onto the land now in dispute by planting sim-sism and sorghum on it.

P.W.2, Alisantorina Ato testified that the land in dispute belonged to her father Okwir Erinayo. She too was born on that land measuring approximately seventy acres. When her father fell ill, he wrote a will bequeathing the land to the appellant, his grandson. The respondents have since taken possession of the land and are growing crops on it. P.W.3 Mary Akwo testified that the appellant is the grandson of Okwir Erinayo and son of Michael Nyero. Before his death, Michael Nyero bequeathed the land in dispute to the appellant. The appellant subsequently obtained a grant of letters of administration. P.W.4 Aya Juranda testified that at the time she got married into the appellant's Loyi clan, the late Okwir Erinayo and his brothers; Tadayo Opano, Amon Obonyo, Oyat and Anyam were occupying the land now in dispute. The first respondent is a grandson of Tadayo Opano and his father is Openy Daniel. They all occupied different gardens of the clan land. It is only in the year 2015 that the land dispute started.

In his defence as D.W.1. the first respondent testified that there are many people cultivating the land in dispute and he is using only ten acres of it. It belonged to his late father Openy Daniel and he has been using the land since he was born. There are several graves of his deceased relatives on the land including that of his late stepmother, Anyiri Natalia who died in 1964. The appellant is his nephew. The dispute began in 2015 after the appellant obtained a grant of letter of administration and attempted t stop them from utilising the land. Otherwise the land is being used by members of the clan for growing crops. D.W.2. Obol Francis, Chairman of the Loyi

Clan, testified that he and both parties to the suit come from the same clan. The appellant, using his position as Secretary of the Clan, obtained a grant of letters of administration without consulting the clan. It is on basis of that grant that he sued the respondents. D.W.3. Aken Justino, testified that the land in dispute belongs to the Loyi Clan. Members of the clan were using it peacefully until the appellant obtained a grant of letters of administration.

Court the visited the *locus in quo* where it observed that there were graves of the respondents' deceased relatives on the land in dispute. The first respondent's sons were occupying part of the land and had shops on it.

In his judgment, the trial magistrate found that all parties belong to the same Loyi clan and the land in dispute belonged to their forefathers. They were peacefully utilising the land as clan members, each with a separate garden. In Acholi custom, it is common practice to have customary land used for settlement and cultivation by members of a specific clan. Whereas it was claimed that the appellant's grandfather left a will bequeathing him the land in dispute, which will was not exhibited in court, the will was subject to that customary practice. It could not be relied on to alter the customary tenure system and land use practices of the clan. The appellant as Secretary of the clan fraudulently used his office to obtain a grant of letter of administration yet he claimed that there was a will. Letters of administration obtained by the appellant were void since he obtained them without knowledge of the clan. The appellant could not rely on the grant to dispossess the respondents of land on which they have lived all their lives. The land in dispute is owned customarily according to Acholi culture and an individual could not claim it as his private property. It belongs to the Loyi Clan and user rights are controlled and regulated by the clan leadership. He dismissed the suit, awarded the respondents damages of shs. 3,000,000/= and costs of the suit.

Being dissatisfied with the decision, the appellant appealed to this court on the following grounds;

1. The trial Magistrate erred in law and fact in failing to consider and weigh the evidence of the appellant vis-a-vis that of the respondents and held that the respondents and the appellant are members of the same Loyi clan and jointly owned and cultivate the suit land

whereas the appellant has his own land clearly distinct and separate from that of the respondents' thereby causing a miscarriage of justice.

2. The trial Magistrate erred in law and fact in holding that the letters of administration granted to the appellant by the same court are null and void whereas the said grant has never been contested by the respondents or any other party thereby occasioning a miscarriage of justice.
3. The trial Magistrate erred in law and fact in failure to evaluate properly the evidence on record thereby arriving at a wrong conclusion hence occasioning a miscarriage of justice.

When the appeal came up on 19th September, 2018 for hearing, the court record indicated that counsel for the respondent was in court on the previous occasion, 3rd May, 2018, when it was adjourned to 19th September, 2018 for hearing. There was no explanation for his absence. Accordingly leave was granted to counsel for the appellant to proceed ex-parte under the provisions of Order 43 rule 14 (2) (a) of *The Civil Procedure Rules*.

Before counsel could proceed, the court on its own motion found that the third ground of appeal was too general and offended the provisions of Order 43 r (1) and (2) of *The Civil Procedure Rules* which require a memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed against. Every memorandum of appeal is required to set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative, and the grounds should be numbered consecutively. Properly framed grounds of appeal should specifically point out errors observed in the course of the trial, including the decision, which the appellant believes occasioned a miscarriage of justice. Appellate courts frown upon the practice of advocates setting out general grounds of appeal that allow them to go on a general fishing expedition at the hearing of the appeal hoping to get something they themselves do not know. Such grounds have been struck out numerous times (see for example *Katumba Byaruhanga v. Edward Kyewalabye Musoke, C.A. Civil Appeal No. 2 of 1998; (1999) KALR 621*; *Attorney General v. Florence Baliraine, CA. Civil Appeal No. 79 of 2003*). Accordingly the third ground of appeal presented in this appeal was struck out.

Grounds one and two as well are argumentative but court chose to overlook that defect and allowed counsel to argue the two grounds. Submitting on behalf of the appellant, Mr. Geoffrey Anyoru argued that the trial court in passing judgment against the appellant proceeded on ground that the land in dispute was customary land belonging to the Loyi clan where both the appellant and the respondents come from. The land was supposed to be used under customary arrangement without exclusion of one another. The Court stated that it would be against the Acholi practices to decide against one of the clan members but in the same breath indicated user of separate gardens. Possession was exclusive and in that case there could be trespass. The question is that if one person is in possession then the other encroaches there should be a remedy. Whereas the court recognised exclusive possession, it came to the wrong conclusion of ownership that denied the appellant the right to usage of the separate gardens.

He argued further that the trial court mixed up the portion in dispute with that which was not. The total area was between 50 - 70 acres the portion in dispute was 9 - 10 acres and this area was the one used for cultivation not for settlement. All the plaintiff's evidence from was to that effect. It was the garden not the area of the homestead that was in dispute. The trial court when passing judgment extended the area in dispute to the area under settlement when it alluded to visible graves. There is no evidence on record of a visit to the locus.

Submitting in respect of the second ground, he argued that the court went ahead to nullify letters of administration granted to the appellant in respect of his father's estate for the reason that they were obtained though fraud. That was not the subject of the trial. There was no cause of action in that relation. The grant was not challenged. It was not one of the issues raised. The appeal should therefore be allowed. The judgment of the lower court be set aside and replaced by one passed in favour of the appellant.

This being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000*; *[2004] KALR 236*). In a case of conflicting evidence the appeal court

has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

Trespass to land is the unjustified entry onto land in another's possession, i.e. entering onto the land without permission, or refusing to leave when permission has been withdrawn (see *Davis v. Lisle [1936] 2 KB 434, [1936] 2 All ER 213*). An action of trespass to land is in essence an assertion of the right of possession of land, which then necessitates possession before the interference complained of. In the instant case, no oral evidence was led describing the boundaries of the land in dispute, and the extent to which acts of trespass occurred onto the land. The trial court was only able to make this determination upon its visit to the *locus in quo*. The judgment of the court shows that in his finding as regards ownership of the land and on this aspect, the trial magistrate relied almost exclusively on his observations at the *locus in quo*, as follows;

> when the court visited, there were visible graves of the relatives of the defendants. There were cemented graves and shops of the children of the first defendant. This is where they use a customary land for settlement (sic).....for the above foregoing reasons, I find that the land in dispute is customary in nature....[it] does not belong to the plaintiff but rather it is customary land for Loyii clan....

Unfortunately, the proceedings at the *locus in quo* are missing from the record of appeal and from the original trial record. It is not possible to determine whether or not there is merit to counsel for the appellant's argument that the trial court mixed up the portion in dispute with that which was not, without an illustration of both segments of this land as demonstrated to the court on its visit to the *locus in quo*. The law on a missing record of proceedings has long been established. Where reconstruction of the missing part of the record is impossible by reason of neither of the parties being in possession of the missing record, but the court forms the opinion that all the available material on record is sufficient to take the proceedings to its logical end, the court may proceed with the partial record (see *Mrs. Sudhanshu Pratap Singh v. Sh. Praveen (Son), RCA No.32/14 & RCA No. 33/14, 21 May, 2015* and *Jacob Mutabazi v. The Seventh Day Adventist Church, C.A. Civil Appeal No. 088 of 2011*).

However, where reconstruction of the missing part of the record is impossible and court forms the opinion that all the available material on record is insufficient to take the proceedings to its logical end, a re-trial should be ordered (see *Mukama William v. Uganda, [1968] M.B. 6; Nsimbe Godfrey v. Uganda, C.A. Criminal Appeal No. 361 of 2014* and *East African Steel Corporation Ltd v. Statewide Insurance Co. Ltd [1998-200] HCB 331*). After carefully analysing the arguments presented and the status of the partial record available to court, I have formed the opinion that the available material on record is insufficient to take the proceedings to its logical end, yet reconstruction of the missing part of the record is impossible. This Court cannot proceed on the basis of mere surmises on what the trial court observed at the *locus in quo* and as to how its observations thereat influenced or did not influence its decision. A retrial is accordingly ordered. Each party is to bear their own costs of this appeal.

Dated at Gulu this 4th day of October, 20

Stephen Mubiru

Judge,